# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Question presented | 2 |
| Statute and regulations involved | 2 |
| Statement | 2 |
| Argument | 6 |
| Conclusion | 13 |
| Appendix | 14 |


## CITATIONS


| | |
|---|---|
| Cases: | |
| *Allen, Estate of* v. *Commissioner*, 3 T. C. 844 | 12 |
| *Biddle, Frances, Trust* v. *Commissioner*, 3 T. C. 832 | 12 |
| *Commissioner* v. *Bank of California*, 155 F. 2d 1, certiorari denied, October 14, 1946 | 11, 12 |
| *Commissioner* v. *Bayne's Estate*, 155 F. 2d 475 | 11, 12 |
| *Commissioner* v. *Estate of Field*, 324 U. S. 113 | 12 |
| *Commissioner* v. *Hall's Estate*, 153 F. 2d 172 | 11 |
| *Commissioner* v. *Irving Trust Co.*, 147 F. 2d 946 | 11 |
| *Commissioner* v. *Kellogg*, 119 F. 2d 54 | 11 |
| *Commissioner* v. *Losker's Estate*, 141 F. 2d 889 | 11 |
| *Eldredge* v. *Rothensies*, 150 F. 2d 23 | 11 |
| *Fidelity Co.* v. *Rothensies*, 324 U. S. 108 | 12 |
| *Goldstone* v. *United States*, 325 U. S. 687 | 12 |
| *Hart* v. *Gregg*, 32 Ohio St. 502 | 8 |
| *Helvering* v. *Hallock*, 309 U. S. 106 | 9, 12 |
| *Lloyd's Estate* v. *Commissioner*, 141 F. 2d 758 | 12 |
| *Low, Estate of* v. *Commissioner*, 2 T. C. 1114, affirmed *per curiam*, *sub nom. Orne* v. *Commissioner*, 145 F. 2d 832 | 9 |
| Statutes: | |
| Internal Revenue Code, Sec. 811 (26 U. S. C. 1940 ed., Sec. 811) | 14 |
| Miscellaneous: | |
| Paul, Federal Estate and Gift Taxation (1946 Supplement) 196–197 | 12 |
| Restatement of the Law, Trusts, Sec. 411 | 9 |
| Treasury Regulations 105, Sec. 81.17 | 11, 12, 14 |




725917—46——1

# In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 729

JAMES W. BEACH, EXECUTOR UNDER THE WILL OF HARRY L. BEACH, DECEASED, PETITIONER

*v.*

HARRY F. BUSEY, COLLECTOR OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The memorandum opinion of the District Court (R. 21–24) is reported at 64 F. Supp. 220. The opinion of the Circuit Court of Appeals (R. 35–39) is reported at 156 F. 2d 496.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 15, 1946. (R. 33.) The time for filing a petition for a writ of certiorari was extended to December 14, 1946 (R. 43), and the

petition was filed on November 29, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTION PRESENTED

Whether two substantially identical trust instruments executed by decedent and his wife in 1925 and 1926 are to be interpreted as giving decedent a possibility of reversion, contingent upon his death, as to 80% of the trust property, the percentage of his contribution to the trusts, thus making the transfers ones intended to take effect in possession or enjoyment at or after his death and requiring the inclusion in his gross estate, under Section 811 (c) of the Internal Revenue Code, of the value at his death of 80% of the trust property.

## STATUTE AND REGULATIONS INVOLVED

The pertinent statute and Treasury Regulations are set forth in the Appendix, *infra*, pp. 14–19.

## STATEMENT

The facts, which were all stipulated except for two documents (R. 23), may be summarized as follows:

On March 2, 1925, and January 23, 1926, respectively, the decedent Harry L. Beach and his wife, Elizabeth C. Beach, as settlors, created two trusts, decedent contributing $80,000 face amount

of United States bonds to each trust and his wife contributing $20,000. Decedent died testate on March 25, 1942. Petitioner, as executor of his estate, filed an estate tax return which did not include any part of the value of the two trusts in decedent's gross estate. The Commissioner determined a deficiency of $18,655.70 on the basis of the inclusion of 80% of the value of the two trusts as of the date of decedent's death. The deficiency was paid under protest, a claim for refund was timely filed and rejected, and this suit followed. (R. 4–6.)

The relevant provisions of the two trusts (R. 8–10, 14–15) are substantially the same (R. 22). After a statement of the transfer to the trustee, each trust provided as follows (see R. 8–10):

> To have and to hold unto said trustee and its successors in trust for the uses and purposes as follows:
>
> 1. To collect the income arising therefrom and from such income, to pay all taxes, assessments, costs and expenses incident to this trust, and thereafter from the net annual income to pay:
>
> (A) To the Settlor, Elizabeth C. Beach, during the life of the Settlor Harry L. Beach, the net annual income from said trust fund.
>
> (B) Upon the death of the Settlor Harry L. Beach, said Trustee shall pay said net annual income jointly to the Settlor Elizabeth C. Beach and Camilla

Beach during their joint lives, and upon the death of either, then the Trustee shall pay said net annual income to the survivor of the said Elizabeth C. Beach and Camilla Beach during the remainder of the life of such survivor.

* * * * *

2. This trust shall terminate upon the death of the last survivor of the Settlor, Elizabeth C. Beach and the daughter of said Settlors, Camilla Beach, and upon the termination of this Trust said trust fund, together with any accumulations thereof, shall be distributed according to the Statutes of descent and distribution of the State of Ohio, to the heirs at law of Harry L. Beach and Elizabeth C. Beach, providing the heirs of both Harry L. Beach and Elizabeth C. Beach are the same persons.

Should the said Harry L. Beach and Elizabeth C. Beach leave no lineal descendants of their direct line, and the next of kin of each were collateral heirs, then said trust fund shall upon the termination of this trust be distributed eighty (80%) per cent to aid collateral heirs at law of Harry L. Beach, and twenty (20%) per cent to the said collateral heirs at law of Elizabeth C. Beach.

* * * * *

On the dates the first and second trusts were created, decedent was 55 and 56 years of age, respectively. (R. 7.)

At the time the first trust was created, decedent had three children and two grandchildren living. When the second trust was created, he had three children and three grandchildren living. His wife, three children, and four grandchildren survived him. The following list shows the name, relationship, and date of birth of decedent's lineal descendants surviving him (R. 6–7):

Camilla Beach—born August 26, 1900—daughter

Nelle Beach (Lynde) Branson—born January 3, 1898—daughter

James W. Beach—born February 4, 1895—son

Henry Beach—born October 3, 1921—grandchild

James Beach—born June 3, 1925—grandchild

Mary Elizabeth Beach—born January 11, 1930—grandchild

Elizabeth Lynde—born June 11, 1923—grandchild

Camilla Beach was an invalid, unable to support or care for herself. (R. 7.)

Interpreting the dispositive paragraphs of the trust instruments, the District Court concluded that, if decedent had survived his wife and daughter Camilla, 80% of the trust property, representing decedent's contribution to the trusts, would, by operation of law, have reverted to decedent free of the trusts. Accordingly, the District Court held that 80% of the value of the

trust property is includible in decedent's gross estate under Section 811 (c) of the Internal Revenue Code. (R. 23–24.) This decision was affirmed on appeal, the Circuit Court of Appeals also interpreting the trust instruments as not excluding the possibility of reversion to decedent. (R. 35–39.)

**ARGUMENT**

Petitioner asserts that this case involves an important question of law and that the decision below is in conflict with other Circuit Courts of Appeals decisions and with the applicable Treasury Regulations. (Pet. 5–6, 9–15.) These assertions, however, assume the correctness of petitioner's contention that, contrary to the conclusions of the District Court and Circuit Court of Appeals, the dispositive paragraphs of the trust instruments are to be interpreted as precluding any possibility of reversion to decedent. (See Pet. 6–9.) In view of the decisions below, the case here involves only the proper interpretation of the particular trust instruments. We submit that the courts below correctly interpreted the trust instruments and that, accordingly, there is no necessity for further review of the case by this Court.

In making disposition of the trust property, the settlors obviously contemplated that decedent

would predecease his wife and/or daughter Camilla. The trust income is payable to decedent's wife "during the life of the Settlor Harry L. Beach [decedent]." (R. 9, 15.) Decedent's wife and invalid daughter Camilla, and the survivor of them, are to receive the trust income for their lives "Upon the death of the Settlor Harry L. Beach." (R. 9, 14.) There is no provision for distribution of trust income, except after decedent's death, in the event his wife should predecease him. The trusts were to terminate upon the death of the last survivor of decedent's wife and his daughter Camilla, but the disposition to be made of the trust property at that time also assumes that decedent will have died previously. The trust instruments (R. 9, 15) provide that, at the termination of the trusts, the trust funds (R. 9–10)—

> * * * shall be distributed according to the Statutes of decedent and distribution of the State of Ohio, to the heirs at law of Harry L. Beach [decedent] and Elizabeth C. Beach [his wife], providing the heirs of both Harry L. Beach and Elizabeth C. Beach are the same persons.
>
> Should the said Harry L. Beach and Elizabeth C. Beach leave no lineal descendants of their direct line, and the next of kin of each were collateral heirs, then said trust

> fund shall upon the termination of this trust be distributed eighty (80%) per cent to said collateral heirs at law of Harry L. Beach, and twenty (20%) per cent to the said collateral heirs at law of Elizabeth C. Beach.

While the first paragraph no doubt refers only to such heirs as are common lineal descendants of decedent and his wife, nevertheless, since it is elementary that "no one is an heir to the living" (*Hart* v. *Gregg*, 32 Ohio St. 502, 511), these heirs could not be determined until decedent's death. That decedent did not mean presumptive heirs is apparent from the fact that the effectiveness of the provision for alternative disposition of the trust property depends in part on whether decedent and his wife "leave" lineal descendants of their direct line. Disposition of the trust property under the alternative provision also assumes the prior death of the decedent, for such disposition is to collateral heirs at law, who are determinable only at decedent's death. Further, in the event decedent and his wife leave no common descendants, the alternative provision can become effective as to 80% of the trust corpora only if decedent's next of kin are collateral heirs. Next of kin, too, can only be determined at decedent's death.

Accordingly, while the trusts are to terminate at the death of the last survivor of decedent's

wife and daughter Camilla, there is no provision for disposition of the trust property at that time in the event the decedent is still living. It seems clear enough that the decedent simply intended to provide an immediate income to his wife and an income for his invalid daughter Camilla upon his death, with the trust corpora to go to his heirs upon the termination of the trust *after* his death. Certainly there is nothing in the record from which it might be inferred that he wished to make a gift of $160,000 (a large part of his total estate) to his son James or his daughter Nelle, or to distant collateral heirs, effective during his lifetime.

It seems only reasonable to conclude, therefore, that 80% of the trust property, the percentage of decedent's contribution, would have reverted to decedent free of the trusts had he survived his wife and daughter Camilla. See Restatement of the Law, Trusts, Sec. 411. It will be noted that even such provision as was made for disposition of the trust property was predicated on the Ohio statutes of descent, a fact which, as the court below noted (R. 37–38), indicates that the beneficiaries of the corpora were to take by descent rather than by purchase. Cf. the Bryant trust covered by the decision in *Helvering* v. *Hallock,* 309 U. S. 106; *Estate of Low* v. *Commissioner,* 2 T. C. 1114, affirmed *per curiam, sub nom. Orne* v. *Commissioner,* 145 F. 2d 832 (C. C. A. 2d).

The ultimate disposition of 80% of the trust property to decedent's heirs is varied only to the extent that the lineal descendants of decedent and his wife Elizabeth are favored over other possible next of kin of decedent, for example, his lineal descendants by another marriage. This variation, however, created another possibility of reversion to decedent, as the court below held. (R. 39.) Decedent's collateral heirs at law were to take 80% of the trust corpora only if he and his wife Elizabeth left no common lineal descendants and if "the next of kin of each were collateral heirs." Thus, if decedent and his wife Elizabeth left no common lineal descendants and decedent had other lineal descendents, the collateral heirs would not be entitled to take and 80% of the trust corpora would have reverted to decedent by operation of law. The terms of the trust make it clear that the settlors considered the possibility of lineal descendants who were not the lineal descendants of both.

It follows that, contrary to petitioner's contentions (Pet. 8–9, 13), the decedent's death was not a neutral circumstance; on the contrary, up until the time of decedent's death it could not be determined whether the trust property would revert to him or go to others. Except for the interest in his wife during his lifetime, his death was the intended and indispensable condition to possession and enjoyment of the trust property

by anyone except himself, as the court below held. (R. 38–39.) This is the proper basis for taxability, as petitioner concedes. (Pet. 13.) There is therefore no merit to petitioner's assertions (Pet. 9–13), based upon a different construction of the trust instruments, that the decision below is in conflict with *Commissioner* v. *Kellogg,* 119 F. 2d 54 (C. C. A. 3d), and with the applicable Treasury Regulations (Appendix, *infra,* pp. 14–19), and that the instant case is illustrative of the confusion concerning the principles which govern taxability in these cases. The confusion and uncertainty in other respects suggested by petitioner (Pet. 12–15), if existent at all,[1] do not affect this case. As the court below

[1] So far as they are pertinent here, the following cases cited by petitioner merely hold that a possibility of reversion dependent upon the prior death of all next of kin of the decedent is insufficient to support taxability: *Commissioner* v. *Kellogg, supra; Commissioner* v. *Hall's Estate,* 153 F. 2d 172 (C. C. A. 2d); *Commissioner* v. *Irving Trust Co.,* 147 F. 2d 946 (C. C. A. 2d); *Commissioner* v. *Lasker's Estate,* 141 F. 2d 889 (C. C. A. 7th). The courts apparently regard such a possibility of reversion as no interest at all in the decedent and the presently applicable Treasury Regulations accept the authority of these decisions. See Treasury Regulations 105, Sec. 81.17, as amended May 1, 1946, Example (6) (Appendix, *infra,* p. 18). On the other hand, different but somewhat remote, possibilities of reversion have been held by two of the same courts to be sufficient. See *Eldredge* v. *Rothensies,* 150 F. 2d 23 (C. C. A. 3d); *Commissioner* v. *Bayne's Estate,* 155 F. 2d 475 (C. C. A. 2d); see also, *Commissioner* v. *Bank of California,* 155 F. 2d 1 (C. C. A. 9th), certiorari denied, October 14, 1946 (No. 267, October Term,

noted (R. 35), the decisions of this Court sufficiently point the way for decision here. *Helvering* v. *Hallock, supra; Fidelity Co.* v. *Rothensies,* 324 U. S. 108; *Commissioner* v. *Estate of Field,* 324 U. S. 113; *Goldstone* v. *United States,* 325 U. S. 687. The only pertinent question not specifically answered by these decisions is whether a distinction is to be drawn between express reverters and reverters by operation of law. The rationale of the decisions indicates, however, that no such distinction is to be drawn and it has been so held by Circuit Courts of Appeals other than the court below. *Commissioner* v. *Bayne's Estate,* 155 F. 2d 475 (C. C. A. 2d); *Commissioner* v. *Bank of California,* 155 F. 2d 1 (C. C. A. 9th), certiorari denied, October 14, 1946 (No. 267, October Term, 1946). See also, Treasury Regulations 105, Section 81.17 (Appendix, *infra,* pp. 14–19); Paul, Federal Estate and Gift Taxation (1946 Supplement) 196–197.

---

1946). In other cases cited by petitioner the transfers were not taxable because, unlike the present case, the decedent's possibility of reversion was not contingent upon his death and could be defeated prior to his death. See, e. g., *Lloyd's Estate* v. *Commissioner,* 141 F. 2d 758 (C. C. A. 3d); *Frances Biddle Trust* v. *Commissioner,* 3 T. C. 832; *Estate of Allen* v. *Commissioner,* 3 T. C. 844. The authority of these decisions is incorporated in Example (2) of the presently applicable Treasury Regulations (Appendix, *infra,* p. 16).

## CONCLUSION

The decision below is correct and involves no conflict of decisions or important question of law. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

GEORGE T. WASHINGTON,
*Acting Solicitor General.*
SEWALL KEY,
*Acting Assistant Attorney General.*
ROBERT N. ANDERSON,
MELVA M. GRANEY,
*Special Assistants to the Attorney General.*

DECEMBER 1946.

## APPENDIX

Internal Revenue Code:

> SEC. 811. GROSS ESTATE.
>
> The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—
>
> * * * * *
>
> (c) *Transfers in Contemplation of, or Taking Effect at Death.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death,* * * except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *
>
> * * * * *
>
> (26 U. S. C. 1940 ed., Sec. 811.)

Treasury Regulations 105, promulgated under the estate tax provisions of the Internal Revenue Code:

> SEC. 81.17 [as amended by T. D. 5512, 1946–10 Int. Rev. Bull. 9]. *Transfers intended to take effect at or after the decedent's death.* A transfer of an interest in property by the decedent during his life (other than a *bona fide* sale for an adequate and full consideration in money or money's worth) is "intended to take effect in possession or enjoyment at or after his

death," and hence the value of such property interest is includible in his gross estate, if

(1) possession or enjoyment of the transferred interest can be obtained only by beneficiaries who must survive the decedent, and

(2) the decedent or his estate possesses any right or interest in the property (whether arising by the express terms of the instrument of transfer or otherwise).

The decedent shall not be deemed to possess a right or interest in the property if his right or interest consists solely of an estate for his life. (For regulations concerning the separate provision of the statute dealing directly with the case of a life estate retained in property transferred by the decedent, see section 81.18.) Where possession or enjoyment of the transferred interest can be obtained by beneficiaries either by surviving the decedent or through the occurrence of some other event or through the exercise of a power, subparagraph (1) shall not be considered as satisfied unless, from a consideration of the terms and circumstances of the transfer as a whole, the power or event is deemed to be unreal, in which case such event or power shall be disregarded. Except as provided in the last paragraph of this section, the value of the property so transferred is includible without regard to the date when the transfer was made, whether before or after the enactment of the Revenue Act of 1916.

*Example* (*1*). The decedent at 90 years of age transferred property in trust, providing for an estate for life in his grand-

daughter, 22 years of age, and a remainder to a child of the granddaughter. It was further provided that the estate in remainder would revest in the decedent if he survived the life tenant. Since the property may revert to the decedent and since the beneficiary taking the remainder must survive the decedent in order to obtain possession or enjoyment of the property, the value of the estate in remainder is includible in the decedent's gross estate. The value of the outstanding life estate is not so includible, since the life tenant need not survive the decedent in order to obtain possession or enjoyment thereof.

*Example* (*2*). The decedent, during his life, transferred property in trust, giving the income therefrom to his son for life and the remainder to his son's surviving issue. If no issue survived the life tenant, the property was to revert to the decedent or his estate. This transfer does not satisfy requirement (1) specified above, since the life tenant's surviving issue need not survive the decedent in order to obtain possession or enjoyment of the property. Accordingly, no portion of the property is includible in the gross estate under this section.

*Example* (*3*). The decedent, during his life, transferred property in trust, giving the income to his wife for her life and the remainder to his father if living at the wife's death. If not, the property was to revert to the decedent if living, and if not, it was to pass to the decedent's issue and their heirs. If the father's death occurs first followed by the death of the decedent, it would appear at the moment immediately prior to the latter's death that possession or enjoyment of the remainder interest can

be obtained only by beneficiaries who must survive the decedent. And since the property may revert to the decedent, requirements (1) and (2) are both satisfied, and the value of the estate in remainder is includible in the decedent's gross estate.

*Example* (*4*). The decedent, during his life, transferred property in trust, providing for payment of the income to his son until the latter reached the age of 25, at which time the son would receive the corpus. If the son died before reaching 25, the corpus was to revert to the decedent if living; and if not, it was to pass to his son's heirs. No portion of the property is includible in the decedent's gross estate. Although the property may revert to the decedent, his son can obtain possession or enjoyment of the remainder interest even though the decedent is living. Thus, the first requirement is not satisfied.

*Example* (*5*). The decedent transferred property in trust retaining a life estate and giving a succeeding life estate to another, with the remainder to such succeeding life tenant's issue who survived both the decedent and the life tenant. The decedent also retained the power to designate who shall take the remainder in case the succeeding life tenant died without surviving issue. Here, possession or enjoyment of the property can be obtained by the succeeding life tenant and by the succeeding life tenant's issue only if they survive the decedent; thus satisfying requirement (1). Requirement (2) is also satisfied with respect to the interests of both beneficiaries since the decedent retained a right in the entire property, i. e., a contingent power of appointment. The entire value of the property, including

the value of the succeeding life estate and the remainder is, therefore, includible in the decedent's gross estate.

*Example* (*6*). The decedent transferred property in trust, reserving a life estate and providing succeeding life estates in his wife and son. Upon the death of the son, the principal was to be paid to the son's wife; if the son's wife did not survive her husband, to the son's issue; and if there were no issue, to the decedent's next of kin. In this case, the decedent has parted with every right or interest in the property and hence requirement (2) is not satisfied. Accordingly, no part of the property is includible in the decedent's gross estate.

*Example* (*7*). The decedent transferred property in trust to pay the income to his son during decedent's life, and at decedent's death to pay the principal to his son if living; if not, to his son's issue surviving both the son and the decedent. In this case, the property may revert to the estate of the decedent if neither his son nor his son's issue survives him. Moreover, neither the son nor the latter's issue can obtain possession or enjoyment of the property unless they survive the decedent. The entire value of the estate in remainder is, therefore, includible in the latter's gross estate.

*Example* (*8*). The decedent, during his life, transferred property in trust providing for payment of the income to his daughter during the life of the survivor of himself and his wife, and the remainder to his daughter or her issue. The wife was given the unrestricted power to alter, amend or revoke the trust. At the decedent's death, his wife is still living. Here, although it

appears immediately prior to the decedent's death that the property may revert by operation of law to the decedent's estate in the event that the daughter and her issue should predecease the decedent and his wife, the first requirement is not satisfied, since the wife can obtain possession or enjoyment of the property during the decedent's lifetime through the exercise of her power to alter, amend, or revoke. No part of the property is, therefore, includible in the decedent's gross estate. If the wife had predeceased the decedent, requirement (1) would be satisfied, since it would appear immediately prior to the decedent's death that neither his daughter nor her issue, the remaining beneficiaries, could obtain possession or enjoyment of the property unless they survived the decedent. Under these circumstances, the value of the remainder would be includible in the gross estate.

U. S. GOVERNMENT PRINTING OFFICE 1946